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No. 13—Consolidated with No. 15

JOHN F. DAVIS

IN THE

Supreme Court of the United States

October Term, 1968.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, ET AL.,

Appellants

v.

ABERDEEN AND ROCKFISH RAILROAD
COMPANY, ET AL.,

Appellees

On Appeal From the United States District Court for the
Eastern District of Louisiana, New Orleans Division

REPLY BRIEF FOR APPELLANTS.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA,
NEW ORLEANS DIVISION.

REPLY BRIEF FOR APPELLANTS.

Appellants, generally herein called "Northern railroads", will first answer the brief of the Southern railroads, to the extent necessary and will thereafter answer the brief of the Southern Governors' Conference, et al.¹

1. After stating that this case has been remanded to the Commission for further proceedings consistent with the requirements of the Administrative Procedure Act, Southern railroads say on page 82 of their brief: "The United States, which is charged by statute with the responsibility for defending orders of the Commission, has not appealed this disposition of the case." At page 7, Southern roads again bring this matter to the attention of the Court. In the court

*Reply Brief for Appellants***I. Reply to Southern Lines' First Point, That "The Inflation" Was Not Supported by Substantial Evidence or Reasoned Findings.**

It should be said, at the outset, that the Southern lines' assertion that the Commission did not make adequate findings is simply incorrect. In addition to its general findings about its cost determinations, Appendix B to its report (A. 87-129) contains a detailed discussion of the disputed cost adjustments and shows specifically the reasons that led the Commission to reject the adjustments which it did reject. Northern lines believe that the Court will find in that Appendix an unusually thorough statement of findings in support of the action taken with respect to these disputed cost points.

The cost evidence upon which the Commission acted in the proceeding here under review was that resulting from Southern lines' application of regional unit costs for Official and Southern territories (as adjusted in five respects advocated by Southern lines) to the exact units of transportation involved in the North-South traffic, as disclosed by Southern lines' traffic study. The Commission found that these costs "adequately reflect the costs which are attributable to the traffic at issue" (A. 49-50), and are "reasonably accurate and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis" (A. 78).

It may be noted in summary form, that the following facts before the Commission supported these findings:

The case involved transportation between the whole of Official Territory and the whole of Southern Territory, be-

below the United States urged that the order of the Commission should be sustained. Lest the Court be misled into believing that the United States has changed its position and now agrees with the decision below, Appellants desire to state that they have been informed by the Attorney General that the reason that the Department of Justice did not prosecute its appeal was that it could make no special contribution to the defense of the order involved and that the order could be adequately defended by counsel for the Interstate Commerce Commission.

tween all stations and over all railroads in each territory, and related to virtually all commodities. The initial indication that territorial unit costs were appropriate was thus quite strong. And this conclusion was confirmed by previous rulings of the Commission that territorial costs are proper for use in a case such as this involving "the calculation of relative costs for transporting all traffic, or important and well-defined segments of traffic, by territorial groups of carriers." *Class Rate Investigation, 1939*, 262 I.C.C. 447, 693 (1945).

The percentage of the total traffic of the railroads involved was about two and one-half times as great as the percentage of total traffic involved in the *Class Rate* case² and a much greater percentage of all traffic than the percentage of total traffic in other important cases (e.g. *Class Rates, Mountain-Pacific Territory*, 296 I.C.C. 555 (1955) where the traffic involved was only 1% of the total traffic) (p. 614) and in cases wherein Southern lines used Form A

2. Appellees say with relation to this point that in the *Class Rate* decision the Commission's effort was to ascertain, by the use of costs, whether territorial conditions justified differences in the class rates. This simply emphasizes that it regarded territorial costs as being appropriate for application to class rate traffic as an important and well-defined segment of traffic being transported by territorial groups of carriers between all points. As the Court pointed out in reviewing the Commission's order in that case, the orders "affect class rates and class rates alone" and that ". . . this proceeding pertains only to class rates, which move but a small percentage of the traffic"; 331 U.S. at 330 and 343.

On p. 19 of their brief the Southern lines say that in *Increased Freight Rates, 1967*, 332 I.C.C. 280, the Commission held that territorial average costs have little value in determining the costs of handling particular segments of traffic. It will be noted from the quotation on pp. 19 and 20 of that brief that in support of the quoted language the Commission cited *Louisville & N.R. Co. v. Akron, C. & Y. Co.*, 309 I.C.C. 491, the very case which, in the order here under review, the Commission distinguished from the situation here presented, contrasting the very limited scope of that case (*Louisville & N.R. Co.*) with this territory-wide divisions case embracing "a large and varied body of traffic . . ." (A. 106).

territorial costs as representative (A. 796, A. 953-957).

Another fact of significance is that in the initial (January 12, 1953) report in the proceeding in which the order here under review was issued, the Commission found that the Northern lines' territorial cost studies based upon Form A must be regarded as "adequate proof" of the relative costs (except that the Commission believed that the facts would change with respect to certain maintenance items) (287 I.C.C. 497, 525, 526).

The record also established that the North-South traffic is an inseparable part of the whole, utilizing the transportation facilities and services of Northern lines and, in the witness's opinion, of Southern lines, in the same way as other traffic (A. 575). This conclusion was supported by studies showing the intermingling of the North-South traffic with traffic in general in such operations as switching, transfer movements, mine runs, yard and classification service, interchange service, local freight service, through freight service, car float and lighterage service, and yard terminal service, and it related to both loaded and empty cars (A. 548-582). While the witness testified directly as to operations on Eastern railroads, he established his knowledge of the methods by which railroad operations are conducted generally, and testified that, in his opinion, the same interdependence and commingling of traffic would apply on the Southern lines as well (A. 542, 548, 575).

Southern lines state in their brief that the witness who presented this evidence knew nothing about "empty return ratios or the other cost elements that cause the inflation in Northern costs" (fn. 1, pp. 15-16); but the fact is that at the record reference given by Southern lines (A. 986) the witness who had testified that "Eastern lines are fully justified in attributing to the Official-Southern traffic the average costs of handling all traffic" (A. 576) stated, on cross-

examination, that he included within the term "costs", such things as interchange costs, wages, fuel, maintenance of way, car repairs, depreciation and return (A. 985).³

The Commission also had before it the fact that the great part (89.45%—Appellants' Brief p. 32) of the costs submitted by the Southern lines as representing the cost of North-South traffic were the territorial average costs, a fact which strongly suggests that the territorial costs were representative of the North-South traffic. Finally, it had before it the Northern lines' evidence in opposition to each of the adjustments proposed by Southern lines (A. 893-904; A. 911-931; A. 933-959).

It is manifest that all of the foregoing constituted "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and "be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury" (*Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 620 (1966)).

Southern lines argue, however, that the higher Northern costs result from a relatively few elements of service and that the Northern lines did not show that such higher costs had any relation to the North-South transportation. In effect, they here argue that Northern lines were bound to make a special case as to those factors which were higher for Northern than for Southern lines.

3. It should be noted that the Southern lines stated with relation to this witness that "The Northern railroads did introduce a 'train utilization study' designed to show that the North-South traffic moves in the same trains as other traffic . . ." (p. 15). The "train utilization study", however, was *only one of two studies* which the witness submitted. He testified that "The first of these studies may be termed a train utilization study . . .", and that "The studies in the second group . . . are illustrative of the commingling of traffic and the interdépendence of trains comprising the general transportation network" (A. 545). Southern lines do not mention the studies in the second group (A. 548-582).

The mere fact that a given factor resulting from the application of a cost formula may be higher for one group than the other does not give rise to a requirement that more proof be adduced with respect to the representative character of that element than is needed with respect to such elements of costs as are the same for both groups. The Northern lines' evidence, the factual situation as to the scope of the proceeding, and the Commission's precedents all strongly show that the average unit costs (applied to a proper traffic study of this precise transportation) were reasonably accurate for use as to the North-South traffic. Southern lines attempted to adjust them for the improvement of their case, but they did not succeed with respect to all of the adjustments thus proffered.

They now contend that even if their adjustments were properly rejected by the Commission, the use of the cost factors from Form A which "produced the entire inflation" (i.e. which were higher for Northern than for Southern lines) "remains unsupported by evidence relating such an inflation to North-South traffic" (Southern lines' brief, p. 27). The Northern lines showed to the satisfaction of the Commission that the Southern lines' adjustments which were rejected, were faulty and based upon assumptions and it was shown that they were inferior to the Form A costs and, as shown above, that the territorial costs were reasonable and reliable for use as to the North-South traffic. Northern lines had no greater duty with respect to those costs which were higher than with respect to those which may have been the same. While stated in terms of substantial evidence, the Southern lines' contention to the contrary, represents, in essence, simply another way of saying that the courts, rather than the Commission, shall determine the degree of refinement required in the complex matter of transportation costs, and shall determine what

weight shall be given to the evidence and what conclusions shall be drawn therefrom. This the Court has repeatedly said it would not sanction, and as recently as in *Chicago & N.W. R. Co. v. Atchison, Topeka & S.F. R. Co.*, 387 U.S. 326 (1967), which involved exactly the problem that is involved here.

II. The Appellees' Purported Distinction of Chicago & N.W. R. Co. Is Invalid.

The Northern lines urged in their opening brief (pp. 26-30) that the recent decision in *Chicago & N.W. R. Co. v. Atchison, T.&S.F. R. Co.*, *supra*, constitutes an unusually strong precedent for the reversal of the District Court in the present appeal. In purported answer to this point, the Southern lines say in their brief (28) that "The Court pointed out that the parties *attacking* the order (the Mountain-Pacific railroads) were the *beneficiaries* of an inflation in their divisions." [Italics by Southern lines.] This attempt at distinction is obviously no distinction at all. The parties attacking the order suffered a substantial reduction in their divisions and the fact that their new divisions were still higher ("inflated") than those of the Midwestern lines is not a fact of significance. An order must be supported by substantial evidence whether or not it involves either party's getting or retaining an "inflation".

The Southern lines do not answer the statements in Northern lines' brief (pp. 28 and 29) to the effect that the costs upon which the Commission acted in *C.&N.W.* were basically the average costs of handling all traffic. They quoted two phrases from this Court's opinion in *C.&N.W.* to the effect that the Court upheld the Commission's decision to base its cost findings upon the "special cost study and analysis" prepared by the Mountain-Pacific carriers, subject to certain adjustments which "in the judgment of

the Commission, more accurately reflected the true costs of the traffic involved" (p. 28). But, that the special cost study consisted of Form A territorial costs with some adjustments allowed and some disallowed, as in the present case, is a fact not mentioned in the Southern lines' discussion of *C.&N.W.* As pointed out in our opening brief (pp. 28-29), the Southern Governors' Conference et al., Appellees in the present case, stated in their *amici* brief to this Court in *C.&N.W.* (pp. 2-3) that the Commission's cost findings in that case, and in the present case, reflected the very same approach, that in the *C.&N.W.* order the Commission relied "almost exclusively upon the average costs of handling all traffic in these territories" and that "there, as here, virtually every objection to reliance upon such territorial averages was brushed aside without either findings or evidence to support such action" (pp. 2 and 3).

The nature of the cost evidence in *C.&N.W.* as being substantially similar to that involved in the present appeal, with the same arguments against its use having been urged, was also made clear by the brief of the Appellees (Mountain-Pacific railroads, represented by the same principal counsel as Southern lines here) to this Court in that case (p. 90):

"The underlying problem is that, for important elements of cost, the Commission's 'restatement' uses the *average* costs of *all* traffic handled by the respective groups of railroads, as contrasted with the costs of handling the transcontinental traffic at issue. The Commission's report concedes that the 'principle, which is correct,' is to determine the costs of handling the transcontinental traffic at issue (R. 1010). But the Commission's 'restatement' of costs nevertheless uses average costs in many important respects, an approach which grossly overstates the costs of the Midwestern

railroads, particularly in their capacity as intermediate (bridge) carriers of transcontinental traffic."

From every substantial standpoint, Northern lines' contention that *C.&N.W.* should control the decision in this case remains unanswered.

III. Reply to Appellees' Point Concerning Specific Items of Cost.

A. The Commuter Deficit.

In Northern lines' opening brief it was pointed out (pp. 44-45) that the Southern lines insisted that passenger deficits be included as part of the constant costs⁴ in arriving at the cost of the North-South freight service and that as a result of considering passenger deficits the Southern lines' annual revenues from the prescribed divisions are greater by at least \$1,389,000 than if passenger deficits had not been included in the costs. Now Southern lines argue that the Commission made no findings relating to the North-South traffic so much of the commuter deficit as resulted from costs solely related to commutation service. In Northern lines' opening brief (p. 48) it was pointed out that it is of the very nature of constant costs that they are not incurred in the performance of particular services to which they are assigned. It was also shown (p. 53) that the Commission's consideration of overall passenger deficits resulted in the assignment of Southern lines' solely related passenger costs to the freight service involved, but that this was not true as to such costs of Northern lines, since Northern lines'

4. This Court noted in *American Lines v. L. & N.R. Co.*, 392 U.S. — (1968) at p. —, note 3, 88 S. Ct. 2105, 2107, that the Commission defines fully-distributed costs as the out-of-pocket costs "plus a revenue ton and revenue ton-mile distribution of the constant costs, including deficits . . ."

passenger revenues exceeded their solely related passenger expenses.

Realizing their inconsistency in insisting that the solely related passenger costs pertaining to commutation service were improperly considered because of the alleged absence of a finding relating them to freight service, and their benefiting from the Commission's having considered their own solely related passenger costs without any such finding, the Southern lines state that (fn. 20, p. 34 of their brief):

"The obvious solution, if there were passenger deficits not related to freight operations in both North and South, would have been to exclude such deficits in both territories. Even under the Northern railroads' argument, the failure to exclude all solely related passenger deficits was prejudicial to the Southern railroads in view of the much greater effect of the commuter deficits in inflating the costs of the Northern railroads (A. 1291)."

This appendix reference is to a figure of \$1,502,181 (A. 1291) which is given as representing the amount by which Southern lines' cost of performing the freight service involved would be reduced by the exclusion of their solely related passenger deficit. This figure they compared with a higher figure said to represent Northern lines' suburban deficit. The calculation which produces this figure (\$1,502,181) appears in a footnote in the Southern lines' exceptions to the Examiner's recommended report (A. 1356-1357). It is surprising that the Southern lines should cite this figure to this Court, in view of what it conceals:

(1) While approximately 44.8% of the figure shown by Southern lines as representing Northern lines' suburban deficit represents return on investment⁵ (A. 873), in calcu-

5. A. 873. The amount shown for return (\$36,500,000) is 44.8% of that figure plus the remaining part (\$44,869,450) of the Suburban deficit, a pro rata part of which was allocated to North-South traffic.

lating their own solely related passenger deficit, the Southern lines include nothing for return although it is obvious that they have many millions of dollars invested in passenger stations, locomotives, cars, coach yards, and other passenger facilities;

(2) While the Northern lines' suburban deficit figure relied upon by Southern lines includes rents and taxes, along with operating expenses (V. S. 40, p. 21; A. 872-874), their figure for their own solely related passenger deficit allocated to North-South traffic includes nothing for these items, not even for taxes on such things as passenger stations or the payroll taxes on the wages of the train crews, station and other passenger service employees. It simply matches passenger revenues with operating expenses (Ex. R. 13; A. 980-981);

(3) While the Southern lines' adjustment for Northern lines' suburban deficit was based upon figures for the year 1957 (V. S. 14, Ex. D and E; A. 719-720), their adjustment for their own solely related passenger deficit employed figures for the year 1956 (A. 1356-7). The passenger deficits of both groups of lines were substantially higher in 1957 than in 1956 (Ex. R. 13; A. 980-981). Having used Northern lines' suburban deficit for 1957, Southern lines clearly should have used their 1957 solely related passenger deficit in making adjustment for that factor. Had they done so, that deficit as apportioned to the North-South traffic (and without including anything for return on investment, rents or taxes) would have been \$2,798,236.00 (see the Appendix hereto). This plus Southern lines' allocation of \$377,070 to the North-South traffic for the Southern suburban deficit totals \$3,175,306, as compared with Southern lines' calculation of a Northern suburban deficit of \$2,830,575 for the North-South traffic (A. 1291).

From the foregoing it will be seen that, over and above everything else, in the light of the admission of Southern lines' counsel (Tr. 16; A. 229 and Southern lines' brief, p. 34, fn. 20) that the Southern lines' solely related deficits should be excluded from their costs if the commuter deficits of the railroads are to be excluded, the matter of the Commission's treatment of passenger deficits, including suburban deficits, manifestly did not prejudice the Southern lines.⁶

On p. 34 of their brief Southern lines infer that Northern lines argue that since the Commission included allowances for "overhead" it included commuter deficits "not on

6. On p. 32 of their brief the Southern lines quote from the Commission's decision a sentence reading:

"Because the suburban service deficit includes common costs which must be incurred to provide freight service or intercity passenger services, such costs are properly chargeable to those services to the extent they cannot be recovered from suburban operations, * * *."

The words "such costs" obviously refer to the costs represented by the suburban deficit; it is only the deficit which is charged to the freight service, the excess of the costs over the revenue, not the entire costs themselves.

The Southern lines argue that the only allowance to be included under "overhead" would be for officers salaries, general office expenses and other overhead inherent in freight operations. This is a surprising contention from parties who insisted that the passenger deficit be included as part of the constant costs. The term "constant costs" and "overhead burden" or "overhead expenses" have essentially the same meaning—*American Lines v. L. & N.R. Co.*, 392 U.S. —; 88 S. Ct. 2105 (Appellants' brief, p. 44).

Southern lines' argument based upon the Commission's exclusion of platform costs (So. Br. 35-6) is unsound. The Commission found that in the situation involved unloading had become the responsibility of the shippers (A. 88). When the carrier performs the service for the shippers and the charges which it established do not cover costs, the Commission simply declined to include the deficit in the North-South costs. Exercising its discretion in this manner with respect to platform costs obviously did not prevent it from considering passenger deficits as part of constant costs, as the Southern lines insisted it should.

a relative cost theory, but on a revenue needs theory", and the Southern lines say that this is not correct because the Commission found the revenue needs the same in each territory. The revenue needs which the Commission refused to allow were general revenue needs *over and above fully distributed costs*. (See Appellant-Railroads' brief p. 49). As the Southern lines stated in their brief to the Commission (pp. 198-199)

"... the nature and operation of the so-called 'revenue needs' test must be examined in relation to the vital cost of service issue. Since the costs include allowance for overheads and return, divisions based on relative costs reflect '*a due proportion* of the burden of maintaining the financial integrity and credit of the carrier.' *New England Divisions*, 66 L.C.C. 196, 199. Accordingly, and by definition, a separate claim based upon 'revenue needs' is a claim for a disproportionate share of the revenues, a share in excess of the 'due proportion' of the financial burden reflected in the cost evidence.

At p. 36 of their brief, the Southern lines argue that Appellants contend that the "rates should be divided in accordance with the manner in which they are made." This matter was discussed in the Commission's brief (p. 43), the point being made that passenger deficits were included in fixing the level of the joint freight rates on North-South traffic and that in considering passenger deficits in fixing the divisions, the Commission merely divided the rates in conformity with the factors which went into determining their level. Southern lines argument (p. 37) that "... the rate levels in both territories are shown by the record to be uniform; and the interterritorial rates being divided here are on the same uniform level" is false. They are here referring only to class rates. Only about 1% of all carload

tonnage moves on class rates in the Eastern United States; *Eastern Central Motor Carriers Association v. B&O. R. Co.*, 314 I.C.C. 5, 17 (1961).

Rate levels within the North have become higher than those within the South. *Official Southern Divisions*, 287 I.C.C. 497, 523; *Increased Freight Rates, E.W. and S. Territories, 1956*, 300 I.C.C. 633, 686. It is clear therefore, that the rates of the Northern lines which actually move the great body of the traffic are higher than those of the Southern railroads. Moreover, the mere fact that class rates are uniform would not require the exclusion of deficits from consideration in fixing divisions. Total passenger deficits were taken into consideration in making those class rates even though they are uniform (*Class Rate Investigation, 1939*, 262 I.C.C. 447, 573).

The passenger deficit considered by the Commission in fixing the level of freight rates is the entire passenger deficit. The Commission considered overall rates of return from all operations (see, for example, *Increased Freight Rates, 1948*, 276 I.C.C. 9), and the increase in operating expenses due to wage, price and tax increases attributable to all services (see, for example, *Increased Freight Rates, 1948*, 276 I.C.C. 9, at 20-24, and *Increased Freight Rates, E.W.&S. Territories, 1956*, 300 I.C.C. 633, at 641-647, 657-658. Since the entire passenger deficit was taken into consideration in fixing freight rates, it would manifestly be unfair in dividing the freight rates to eliminate part of the deficit, a part which bears more heavily upon one group than the other.⁷

Southern lines argue that there is another policy choice in dealing with suburban deficits, that is to place the

7. Southern lines say (Br. 30) that there is no commuter service in Florida and that this Court had no occasion to consider the treatment of deficits arising from costs solely related to passenger service in *King v. U.S.*, 344 U.S. 254. There the Court sustained an order requiring that Florida intrastate rates be brought up to the inter-

financial burden of the deficits on the communities receiving the service. In support of their assertion that the Commission has "adopted the policy" that commuter service should not burden freight operations, they quote (p. 38) from *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 483 (1959) to the effect that where railroads are unable to operate a particular "local or commuting" service at a profit, and where such service is essential to the community, steps should be taken by state and local authorities to provide the service paying the carrier the cost plus a reasonable profit.

What is thus represented to be the adoption of a "policy" by the Commission, is in fact, one of a series of "recommendations" to others (306 I.C.C. at 482). There is a great difference between making a recommendation and adopting a policy.

It should also be noted that the Commission did not state that from and after the making of that recommendation it would no longer include deficits resulting from the performance of such services in the constant costs allocated to freight service. Finally it should be observed that the Commission's recommendation applied to local train service as well as commuter, yet the Southern lines included all of their local passenger service deficits in ascertaining the cost of performing the North-South freight service here at issue.

At p. 39 of their brief the Southern lines quote from a House Report to the effect, *inter alia*, that it would seem evident that if commuter service must be preserved losses incurred will have to be met "in some way" by the com-

state level. That level had been fixed on the basis of including the entire passenger deficits of the Southern Region lines. Whatever commuter deficits those lines (including the Illinois Central, which has a large commutation operation) incurred was considered in fixing that rate level; and no distinction was made between solely related and common costs. *Id.* 265-266; *Increased Freight Rates, 1948*, 276 I.C.C. 9, 40.

munities, and that it is unreasonable to expect that such service should continue to be subsidized by the freight shippers. Plaintiffs contend that this shows Congressional policy. The very next sentence of the report goes on to state:

"There are substantial losses, however, occurring in passenger service beyond those attributable solely to commuter service. Where this passenger service * * * cannot be made to pay its own way because of lack of patronage at reasonable rates, abandonment seems called for." (pp. 11-12)

It is interesting that the Southern lines are not urging that in this paragraph the Congressional policy as to non-commutation passenger service was abandonment and that, therefore, the Commission erred in including deficits incurred in the performance of passenger service other than commutation, i.e., the kind of passenger service that Southern lines provide.⁸

The Commission has not departed from its policy or practice of including a proportionate part of the entire passenger deficit in determining freight service costs, which is all it has done here. Moreover, policy questions are for the Commission and do not present legal questions.⁹

8. This Court said with reference to deficit passenger trains operated by the Southern Railway, "The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered." *Alabama Comm'n. v. Southern R. Co.*, 341 U.S. 341.

9. On pp. 39 and 40 of their brief Southern lines state that the Commission has continued to express its "policy" that commuter deficits should be borne by the local community. They fail, however, to refer to the fact that the Commission has made the same declarations with respect to non-commutation passenger service. See, for example, *New York, N.H. & H. R. Co., Discontinuance of Trains*, 327 I.C.C. 151 (1966) at pp. 219-223.

The Southern lines' contention based upon the *Chicago & North Western* case (their brief, pp. 39-40) is answered in our opening brief at p. 54.

The Southern lines also argue that the commuter service is today subsidized by local communities in the North and that since these subsidies did not exist at the time the record in this case was made, the practical effect of the Commission's action is to provide a double subsidy.

If Southern lines believe that there has been a material change in the facts since the record before the Commission was closed, the proper procedure would be for them to file a petition with the Commission for further hearing. The order under review is at all times subject to change under Section 16(6) of the Interstate Commerce Act (49 U.S. Code 16(6)). Moreover, it should be noted that factors which the Commission considered and which affect the passenger deficit of the Southern lines have undergone a change. They have discontinued a large number of trains, as have other railroads throughout the country. It is clear that if consideration of *any* changed facts is desired by any party the proper procedure is not to set aside the Commission's order but for the party desiring to present argument on the basis of the changed facts to petition for further hearing and modification of the order by the Commission. *Tagg Bros. v. United States*, 280 U.S. 420, 443-445 (1930).

B.-The Commission's Treatment of the Gateway Interchange Issue Was Lawful in All Respects.

Beginning at p. 43 of their brief, the Southern lines argue that the Commission's treatment of the costs of interchange at territorial border points is not supported by substantial evidence and reasoned findings. They state (p. 44) that ". . . the Commission prescribed divisions which include a separate allowance for the costs of 'border interchange' which are 58% higher for the North than for the

South." They leave the false impression that the only interchanges involved are at border points, whereas, in fact, interchanges on North-South traffic are made throughout Official and Southern territories.¹⁰ The Commission used the Northern and Southern territorial costs at all points where North-South traffic was interchanged, whether at territorial borders or at junctions in the South or in the North.

In an effort to show that these costs for interchange services throughout the respective territories did not reflect relative interchange costs of Northern and Southern lines at certain individual territorial gateways, Southern lines presented statements of their operating officers describing generally the operations and various local practices respecting equalization of engine time or the bearing of certain interchange expenses at such gateway points, concluding that the interchange operations performed by the Northern railroads at the several gateways were no more onerous than those of the Southern railroads at the same points (Southern lines' brief, pp. 43-44).

With this background the Southern lines, upon brief and exceptions to the Commission, took the simple average of the Northern and Southern territorial average interchange costs, applied it to an estimated number of cars interchanged between Northern and Southern railroads at such territorial gateways and thereby obtained a figure of

10. For example, a shipment from Boston to Miami might be routed via the New Haven to New York, then interchanged by car float across New York Harbor to the Jersey Central, thence carried to Bound Brook, N.J. and interchanged to the Reading, thence to Philadelphia and interchanged to the B. & Q., thence to Potomac Yard and interchanged to the R. F. & P., thence to Richmond and interchanged to the Atlantic Coast Line, thence to Jacksonville and interchanged to the Florida East Coast for carriage to Miami. Of all the interchanges in this route, Southern lines discussion leaves an impression of the existence of only one, that at the territorial gateway, Richmond.

\$797,043, which they asserted, represented the amount by which Northern costs were overstated and Southern costs were understated, a combined difference of \$1,594,086 (SL Brief, p. 146, A. 1054-5; SL Ex. pp. 104-105, A. 1349-50). Nevertheless, Southern lines did not themselves attempt to adjust their cost study to reflect these figures (SL Brief, p. 146). Instead, they included this item with other considerations of a catch-all character addressed to the general consideration of the Commission apart from their proposed specific cost adjustments (SL Brief, pp. 136-158). Thus, Southern lines, in summing up concerning these catch-all items, stated (SL Brief, p. 158; A. 1057):

"These factors affecting costs must be considered by the Commission in prescribing just, reasonable and equitable divisions for future application to the traffic involved in this proceeding. The Commission may not refuse to give effective consideration to these differences in costs established by the evidence *simply because it has not been possible to measure them precisely in dollars and cents.*" (Emphasis supplied.)

The Northern lines rebutted this testimony, and the Commission found that:

(1) Equalizing the number of engine hours performed on the other lines' rails does not equalize interchange service because each carrier performs a major part thereof on its own rails.

(2) Although many important gateways were cited by the Southern lines' witnesses, not all were included and the proportion of cars passing through unequalized gateways was not shown.

(3) The cost of engine time is not equal in the two territories.

Then the Commission found that there was another, and major, criticism of the proposed adjustment. It found that since Rail Form A territorial costs produce an average cost for all the service units in the territory, such as interchange handlings, when greater or lesser costs than the Form A costs are assigned to particular items, correspondingly lesser or greater costs must be assigned to the remaining units. Thus in proposing the territorial gateway adjustment the Southern lines did not attempt to show to what extent their cost of the other interchanges on the traffic involved would be decreased nor to what extent the Northern costs of the other interchanges would be increased (A. 129).

For all of the reasons indicated above, the Commission refused to accept the proposed adjustments (A. 129).

The Southern lines now argue that they made no claim before the Commission that their method for estimating the level of border interchange costs had to be accepted.¹¹ They state that there was no substantial evidence to support a higher level of border interchange costs for Northern than for Southern railroads, whatever the precise dollar amount of the equal costs. But contrary to Southern lines' statement that the Commission granted "a separate allowance for border interchanges which is 58 percent greater" for the Northern lines than for Southern lines (Brief, p. 46), the Commission granted no such separate allowance; it dealt with all the interchanges of the Northern lines and all the interchanges of the Southern lines and applied the territorial average interchange cost for the respective territories to all such Northern and Southern interchanges,

11. But at p. 105 of their Exceptions they stated that:

"This overstatement in Official territory costs and understatement in Southern Region costs totals \$1,594,086 (referred to by the Examiners as '\$1.6 million' (sheet 58). A proper restatement of the costs of handling Official-Southern traffic should reflect such equalization of the interchange costs at the territorial gateways."

respectively. Its action in doing so was sustained by the facts, discussed in (1) above, showing justification for the use of territorial average costs. Moreover, Southern lines did not rebut the use of the costs so supported by introducing figures so unreliable that even they disclaimed reliance thereon (Brief, p. 46). Nor did they, by bringing forth such figures cast any burden upon the Northern lines to search for other facts relating to operations of the Northern and Southern lines which might be used in substitution for the territorial figures which the Commission, as the expert body, found satisfactory.

C. The Commission's Use of Territorial Average Car Costs Is Sustained by Adequate Findings and Evidence.

In the case before the Commission, when dealing with car costs the Southern lines abruptly departed from the position which they had so emphatically maintained with respect to other proposed cost adjustments, namely, that the costs should be more refined than territorial averages in order to bring them closer to the North-South traffic. As to car costs, they proposed the average costs for all railroads in the United States in substitution for the territorial car costs of the Northern and Southern lines (A. 94-95). The Commission rejected their proposal—finding that “The use of a national average car cost conceals territorial differences in cost which are important in the consideration of divisions between the two involved territories (A. 101).

In their present brief the Southern lines do not even mention the fact that they had urged the substitution of average United States car costs for those of the railroad groups involved in the litigation. They now abandon any attempt to justify the use of United States average car costs, and rest their attack on the ground of an alleged lack of evidence and findings to support the Commission's use

of territorial costs. The Commission's thorough analysis of the evidence and the contentions regarding car costs are found at A. 94-101.

Southern lines' first basis for contending that the territorial average car costs were not representative of the North-South costs was that the composition of the car fleets of Northern and Southern railroads, respectively, differed from the proportions by types of the cars used in transporting freight between the North and the South, because the car fleets contain substantial proportions of open hopper cars, whereas the cars in predominant use in the North-South traffic are box cars. Before the Commission, Southern lines argued (br., pp. 70-75) that the cost of owning and maintaining hopper cars is greater than that of owning and maintaining box cars, and that the lesser utilization of railroad cars on Northern lines is due to hopper cars and not box cars.

The Northern lines answered these contentions by showing that (1) the cost of a box car is greater than the cost of open hopper and gondola cars (V.S. 76, p. 11; A. 918-919). This means that the cost element represented by rate of return is greater on box than on hopper or gondola cars and that the depreciation base is also greater on box cars. This would mean that the presence of a greater proportion of open hopper and gondola cars in the North and the South would serve to reduce the territorial average car costs, thus understating box car costs rather than overstating them. Since the proportion of these open top cars is greater in the North than in the South (V.S. 39, p. 45; A. 858) the comparison would not be unfavorable to Southern lines.

Secondly, so far as the element of repairs is concerned, it was shown that the Southern lines' chief cost witness in this case testified in another recent case that the cost of

car repairs is higher on box cars than on open top cars (V.S. 76, p. 11; A. 918).

Third, with respect to utilization, the Southern lines admitted that (Exceptions, p. 25; A. 1293) "Low utilization of the average car in the North could explain the 32 percent higher territorial average car costs in the North * * *", and Northern lines' evidence showed that the North-South traffic is handled the same as traffic in general, and intermingled with it, on Northern lines. Moreover, the utilization of open hopper cars is higher in the North than in the South (V.S. 76, Appendix B, A. 931; 325 I.C.C. at 63, A. 99), and therefore the lesser overall utilization of cars within the North is not due, as Southern lines have asserted, to Northern lines' greater gondola and hopper car traffic.

The Commission found these cost and utilization figures to be "uncontroverted" (A. 100). It also found that differences in utilization and in costs per year for repairs, depreciation and return are insignificant as between types of cars (A. 96).

The other contention raised by Southern lines against the use of territorial car costs was that those costs were affected by per diem credits and debits and that in figuring the return element in the per diem rate the base is cost of reproduction, whereas in the Form A formula the base for rate of return is original cost. As to this the Commission pointed out that the method by which the per diem rate is arrived at is not the important thing. The important thing is that dollars are collected by the owning road and paid by the using road and that these dollars are just as truly a part of car costs as any other costs connected with the provision and use of cars (325 I.C.C. at 62-63; A. 97-98). Thus, when a railroad uses a car owned by it for transportation over its line, and at other times receives money for its use

on the lines of other carriers the money so received should obviously be used to offset the costs of providing the car. The Commission so found (A. 98).¹²

And it further found (A. 100) :

"We recognize that per diem charges have been based upon car costs computed on a reproduction basis insofar as depreciation and return on investment of the cars is concerned. This differs from the original cost basis used in Form A car cost computations for owned cars. As explained above, the Form A method necessarily includes per diem in the car costs; and is appropriate in situations where, as here, the issues involve divisions of rates on almost all commodities handled in different types of cars, although mainly boxcars, and between numerous carriers throughout both territories."¹³

These findings by the Commission are obviously determinations by an expert body on complex administrative

12. "All of the items entering into the Rail Form A car costs represent actual expenses, and therefore any difference in the car costs between the two territories, whether caused by per diem or other items, is not a discrepancy but is a reflection of the actual situation, and this difference (because it is actual) should be considered in the comparison of the relative costs of the two territories." (A. 98).

13. The net credit and debit balances given on p. 48 of Southern lines' brief for the Northern and Southern railroads relate to their entire operations, which include debits and credits among themselves and with Western and Canadian lines (A. 863).

As "A dramatic example" of the effect of per diem rentals on car costs, Southern lines refer to the situation of the Clinchfield Railroad, as to which it says that the effect, under Rail Form A, of offsetting per diem rentals against costs is to say that that railroad incurs "no cost at all." (Footnote 31, pp. 48-49) Southern lines' evidence simply said that the effect on the Clinchfield was to produce "negative unit costs for return" on investment in cars, and not a negative car cost.

facts; *Chicago & N.W. R. Co. v. Atchison, T.&S.F. R. Co.*, 387 U.S. 326 (1967).¹⁴

At p. 51 of their brief, the Southern lines say with reference to the Commission's finding that among the causes for the difference in car costs as between the North and the South are "differences in tax and wage rates" (A. 100), that there is no evidence to support any difference in tax rates on railroad freight cars and that the evidence shows that the tax rates are higher in the South. The evidence of higher taxes in the North than in the South embraces all taxes, other than federal income and payroll taxes (V.S. 80, Ex. F-4; A. 951) and included taxes relating to cars. To make the comparison between the Northern and Southern lines, the total tax figures were expressed in dollars per mile of road, but they applied to cars, to car shops, and other items of property. With reference to the higher wage rates in the North, the Southern lines intimate (Brief, 51) that prices of materials in the South are higher than in the North. There is no evidence to support any such intimation.

On p. 51 of their brief, the Southern lines say that the third cause assigned by the Commission as an explanation for the differences in car costs is "'a difference in the relative amount of off-line use of owned cars in all territories'". In the Commission's report the sentence ends with a period after the word "territories". In the Southern lines' brief, however, a comma is substituted for

14. The Commission did not say "We are approving car costs 32 percent higher for the North than for the South." It approved the use of the car costs as they were determined on the basis of the formula which it found proper. Moreover, when Southern lines assert that the Commission did not have evidence to support the use of car costs "which are 32 percent higher in the North than in the South" it should be noted that the 32 percent figure represents only a hypothetical example made up by Southern lines and has no relation to the hauls as they actually are in this case (A. 912-913).

the period after the word "territories" within the quotation marks, and then the Southern lines follow it by saying "specifically, 'a greater relative use in connection with the traffic here at issue of cars owned by official territory railroads than of cars of southern ownership' (325 I.C.C. at 64; A. 100-101)." The word "specifically" and its implications are those of Southern lines, not of the Commission. The word used by the Commission to begin the sentence concerning the greater relative use of Official Territory cars was "Moreover", which is quite different from "specifically". The discussion on pp. 51 and 52 of Southern lines' brief can in no way detract from the Commission's statement of the causes of the difference in territorial car costs as including "a difference in the relative amount of off-line use of owned cars in all territories".

The last alleged error urged by Southern lines is that in a divisions case the Commission's responsibility is to determine costs applicable to transportation and that this has nothing to do with the "separate problem" of the financial results which railroads experience in car rentals. The word "transportation" is specifically defined to include cars by Section 1(3)(a) of the Interstate Commerce Act, 49 U.S.C. 1(3)(a), and under Section 1(10) of the Act the use, movement, and interchange of cars is included in the definition of "car service", and a duty to observe reasonable rules and regulations with respect thereto is imposed by Section 1(11). The contention that payment for the use of cars interchanged in the course of transportation is a matter not to be noticed in the fixing of divisions is superficial in the extreme and runs counter to the Commission's finding of the reliability of Rail Form A costs in *Class Rate Investigation, 1939*, 262 I.C.C. 447, 639 (its order in which was sustained in *New York v. U.S.*, 331 U.S. 284), and the consideration and use of Rail Form A in literally hundreds of other cases. With reference

to Southern lines' argument (Br. 49, n. 32) based on *Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639 (1963), it may be observed that the Commission found the factual situation to be such as to disallow that case as a precedent here.¹⁵

The Commission's use of territorial car costs is legal in all respects and is sustained by adequate evidence and detailed findings.

D. The Commission's Determination of the Switching Cost Issue Was Lawful in All Respects.

Southern lines contended that their territorial switching costs were depressed by the presence within the South of a number of commodities moving in large volume and which, they stated, have lower than average switching minutes per car. They offered evidence purporting to show the effect of said volume movements and made an adjustment in the Form A switching costs for the Southern

15. "We distinguish the situation here from that presented in *Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, sustained in *Carolina & N.W. Ry. Co. v. United States*, 230 F. Supp. 581 (W.D.N.C. 1964), wherein an adjustment for reproduction costs was made. There the sole commodity at issue was coal (not involved here), only a certain kind of car was used and such equipment was owned exclusively by the originating carrier, the traffic moved intraterritorially over only specified segments of each carrier's lines, and the car costs of the destination carrier consisted solely of the per diem charge." (A. 100).

Southern Lines' exceptions to the Recommended Report in the present case notes (p. 28):

"Southern Railway System lines do not agree that there is any inconsistency between using original costs in Rail Form A and the use of actual per diem debits and credits. Furthermore, the Southern Railway maintains that, in computing the costs of car ownership, it is proper to credit the excess of per diem credits over cost of ownership to the cost of ownership of the cars involved."

lines, which they followed with a different adjustment for Northern lines. The effect of the proposed adjustment was to increase their switching minutes and, therefore, costs, substantially more than they increased those of Northern lines (A. 113-121).

In this Court Southern lines appear to contend that the action of the Commission in disallowing the adjustment was due entirely, or almost so¹⁶ to their failure to present evidence as to switching in the North comparable to their special switching studies in the South. But this is not correct. The Commission found that their switching studies in the South had weaknesses, both in the sample and in the studies themselves (A. 121). These are set forth in detail in the Commission's thorough analysis of this point at pages A. 113-121.

Southern lines also contend that the Commission's treatment of the "question of comparability" was unlawful because it places upon Southern railroads the impossible burden of making switching studies in the North (p. 55). However, since the switching studies within the South were found to be unsound, the making of special studies by Northern lines within the North for "comparability" would have been futile. Moreover, the Commission was satisfied with the territorial switching costs and, therefore, there would have been no purpose in making additional switching studies throughout the North.

The decision in *Boston & Maine R. Co. v. United States*, 208 F. Supp. 661 (1962) upon which Southern lines rely is inapposite. The traffic involved in that case was largely composed of vehicle parts and electric appliances moving

16. On p. 55 of their brief, they said that "A basic reason" for rejection of their studies was that the adjustment in the North was not made on a comparable basis to that in the South; but when they get to the next page they imply that the Commission held against them "because of the lack of comparable evidence"

to or from only one place. The L. & N. gave evidence of its switching costs at the localities involved and there was no finding that its studies were defective, as the Commission found with respect to Southern lines' switching studies in the present case (A. 121). And the Commission found that the average switching cost in the North was not helpful in that case (208 F. Supp. at 675), which comprised but a very narrow segment of traffic.¹⁷

Southern lines argue that there is no evidence in the record to support the applicability of territorial average switching costs. There was the evidence that this case involves virtually all commodities and all stations and railroads in the North and the South, as well as evidence that the traffic is intermingled with all other traffic. The Commission concluded that (A. 121):

"Territorial average costs are particularly appropriate to the traffic in this case because it is a large and varied body of traffic moving to and coming from terminals in all parts of both territories. In our opinion, and we so find, the depressing effect, if any, of volume switching commodities on the average would affect both territories and, for purposes of comparison, would be largely offsetting."

E. The Commission's Disposition of the Issue Concerning Empty Return Ratios Was Lawful in All Respects.

At the beginning of the discussion of this subject in their brief before the Commission, the Southern lines stated, at pp. 46-47:

17. Southern lines also cite (brief, p. 55) *Commodities-Pan Atlantic Steamship Corp.*, 313 I.C.C. 23, 57 (1960) as a case in which it was indicated that detailed switching studies should have been made by the parties in possession of the facts. This case also involved a narrow segment of traffic moving to and from specialized terminals.

"The Northern lines' cost study and Southern lines' cost study each purports to use empty return ratios applicable to the types of cars handling Official-Southern traffic. The differences between the parties arise only in respect to the data used for box and refrigerator cars and present the issue as to which study uses the most reliable measure of the empty return experienced by the types of cars which actually handle the traffic here at issue.

And again at p. 51:

"* * *. The issue is one of fact—whether the refinements of empty return data used by the Southern lines within the several categories of box and refrigerator cars, provided more reliable data for application to the Official-Southern traffic than the average data produced by the 1956-1957 seven-day study and used by the Northern lines."

It is submitted that no question could be more of an administrative question peculiarly within the competence of the Commission than the determination of the "fact" issue as to "which study uses the most reliable measure of the empty return experienced by the types of cars which actually handle the traffic here at issue." After extensive analysis the Commission directly determined that issue, finding that the Southern lines' data were not as sound an estimate of the empty return incurred by the Official-Southern traffic as were the Commission's seven-day study ratios (A. 110).

That the Southern lines' attack on this conclusion is without foundation may readily be demonstrated.

A study conducted under an order of the Commission (a study based upon a seven-day sample covering a 12-

month period in 1956-1957) developed a box car empty return ratio of 39% for the Northern lines and 33% for the lines of the Southern Region. These ratios were used by Northern lines. The adjustment proposed by Southern lines in this case was to reduce the Northern lines' ratio from 39% to 30%, and to reduce their own, more modestly, from 33% to 30% (A. 102).

Contrary to the impression given in the Southern lines' brief (pp. 58-65) their adjustment for Northern lines did not rest simply upon their contention relating to the use of special equipment in transporting automobile parts. Rather, the adjustment was accomplished in three independent stages. Only the first of these purported to eliminate the claimed influence of special cars for automobile parts traffic upon empty box car miles in the North (A. 108). The second stage of their reduction in the Northern lines' ratio was sought to be justified by an alleged imbalance in the directional flow of traffic between Official territory and Canada (A. 108).

The third stage of the adjustment did not have even the pretense of factual support. It was based upon the witnesses' assumption that there are more movements of assigned cars in the North than in the South because of the greater industrialization in the North (A. 108). The witness admitted that he had made no calculation to support this theory. He agreed that "it is an assumption" (Tr. R. 1694-95; A. 1001-1002).

Each of these stages was carefully analyzed by the Commission. It summarized the evidence presented by Southern lines in support of their vehicle parts adjustment under five points (A. 102-4). The first of these was dismissed as being merely a computation showing what the effect would be if certain assumptions are made and without

any evidence that the conditions assumed actually exist (A. 104, Para. (a)).

The second point, a table of Southern lines purporting to show that Northern lines own more special device cars than Southern (A. 103), was criticized because it failed to take into consideration the fact that cars are interchanged among territories and "It is the car-miles in each territory which affect the empty ratio, and the relative ownership does not necessarily coincide with the relative number of car-miles" (A. 105, Para. (b)).

Southern lines' third point was represented by some figures purporting to show that they participate to a much more limited extent in vehicle parts traffic than do the Northern lines (A. 103-104). As to this, the Commission found that the use of the relationship between carloads and revenues pertaining to vehicle parts to the total "manufactures and miscellaneous" group of commodities does not measure the relationship of special box cars to total box cars "for the reason that many boxcars carried commodities other than manufactures and miscellaneous, and vehicle parts do not all move in special boxcars" (A. 105, Para. (c)).

The next point related to the Southern lines' showing of empty return ratios of box cars for certain Detroit lines in comparison with other Northern lines and the Southern lines and the percentage of vehicle parts to total box car traffic handled by each of the groups of lines (A. 104). Southern lines' brief (p. 61) would seem to suggest that this was the Commission's sole ground for rejecting their "factual showing". The Commission found this to be based on only three observations and too limited to be representative (A. 105, Para. (d)).

The last of this group of five points of Southern lines was an attempt to show statistically the effect on empty

return ratios of the elimination of vehicle parts traffic (A. 104). It was by this step that the first stage of the adjustment—reducing Northern lines' ratio from 39% to 34.66%—was achieved (A. 849, A. 866). The Commission found this statistical evidence (1) to be based on certain assumptions, such as that vehicle parts move only in special cars and that all special cars have a 100% empty return, which "assumptions have not been proven" and, in fact, 12% of the vehicle parts move in other than box cars; (2) the individual steps taken to arrive at the answer "contain estimates or approximations with a wide margin of error"; and (3) the "equating factors for revenue are also only very rough approximations" (A. 106, Para. (e)).

The Commission concluded, *inter alia*, that the five items above "tend to show that these cars may have some effect on the empty return ratio, but they do not support a conclusion that any adjustment is warranted here as to the amount of the effect other than that reflected in the averages used" (A. 106).¹⁸

The Commission thereafter analyzed the Southern lines' contention concerning Canadian traffic and found that the figures given "do not indicate that Canadian traffic has a greater empty return ratio than other traffic" (A. 107).

The Commission's conclusion as to the three stages was in these words:

"In light of the foregoing, we find that: (1) the adjustment for special device cars of 4.27 percentage points is not adequately supported; at best, it is merely

18. In Footnote 37 on p. 63 Southern lines cite *Louisville & N. R. Co. v. Akron, C. & Y. R. Co.*, 309 I.C.C. 491 (1960) as a case in which the Commission criticized the use of territorial empty return ratios. The Commission distinguished that case from the present case (A. 106) as being factually different and pointed out, *inter alia*, that the entire traffic involved in the case was largely composed of vehicle parts and electric appliances moving to and from Louisville.

illustrative; (2) that the adjustment for Canadian traffic is in error; and (3) that the last adjustment of 2.53 percentage points is purely an unsupported assumption."

The issue as tendered by the Southern lines, whether their data or that relied upon by Northern lines, was "more reliable" for application to the Official-Southern traffic was directly decided by the Commission:

"For the reasons discussed above, we find that the empty return ratios for both box cars and refrigerator cars developed by the special studies of the Southern lines are not as sound an estimate of the empty return incurred by the official-southern traffic as are the 7-day study territorial empty return ratios. The latter reflect the compilation of actual data reported by the railroads on a comparable basis in each territory under an order of this Commission." (A. 110)

Southern lines now say that there was no substantial evidence to sustain the Commission's use of the box car ratios resulting from the 7-day study. The appropriateness of applying those ratios was demonstrated, as before indicated, by the fact that the issues relate to all traffic between all of Official and all of Southern territory, by the evidence showing that this huge block of traffic is the product of all of the myriad of operating conditions which influence the loaded and empty movement of railroad equipment (V.S. 8, A. 541-582, and V.S. 73, A. 893-904), by the Southern lines' use in this case of the figures produced by the same 7-day study on traffic moving in all types of equipment other than box and refrigerator cars, and by the fact that movements of auto parts in assigned cars takes place between Official and Southern territories, as well as elsewhere and, as the

Commission found, is therefore reflected in the average figures for Official and Southern railroads (A. 106).¹⁹

F. The Commission's Resolution of the Issue With Respect to Count of Cars Interchanged Was Lawful in All Respects.

The Southern lines introduce their discussion of this issue by a quotation from the dissenting opinion and then say, "No feature of this statement of the problem is questioned in the Commission's report. Instead, the Commission devotes its report to an attack upon the 'estimate' used by the Southern railroads in an effort to correct the inconsistent counting of cars" (Br. 65-66).

The quotation from the dissenting opinion begins with the sentence "The improper counting of a car interchanged instead of terminated by the official lines affects the weighting of that car in computing switching costs." It ends with a like sentence: "The erroneous counting of cars terminated as cars interchanged on the official lines produces higher unit costs for official territory than for southern territory . . ." (Br. 66).

The fact is that the majority report disagreed with the dissenter's assumption that the count of cars was "im-

19. Southern lines stated (Brief, p. 60, fn. 35) that Northern lines rejected a proposal for a joint study of box car empty return ratios. Southern lines sought data in the hands of Northern lines consisting of thousands of wheel reports, and it was clear (1) that the proposed study would have no value, and (2) that whereas the Commission's 7-day study embraced sample days spaced throughout a 12-month period, the 3-day study suggested by the Southern lines would have covered but a span of 18 days, an obviously unrepresentative period and also one which was affected by a strike. A new study spaced throughout a year would have delayed the case, and the Northern lines, as well as the Commission, found the existing data satisfactory. It may be noted that the study proposed by Southern lines was of all traffic on Northern and Southern lines, not just Official-Southern traffic (A. 991, 992).

proper" or "erroneous". The Commission quoted from the evidence of Northern lines on this point:

"This traffic has been counted as interchange traffic for many years. The rates on this traffic are different than the rates on traffic originated or terminated at the same ports. Evidence was introduced to show that the switching characteristics of the port service on this traffic are more akin to interchange than to terminal service." (A. 94)

The Commission concluded, *inter alia*, that (A. 94):

"... the contentions of northern lines have merit, and that a change in the classification of this traffic for costing purposes in this case is not justified."

Contrary to the statement in Southern lines' brief that the Commission devoted its report to an attack upon the estimate used by Southern lines in an effort to correct what the dissenting opinion called an erroneous counting of the cars as interchanged, the report is entirely clear that the Commission rejected Southern lines' contention that the cars in question were improperly classified.

The Commission also found that the estimates which Southern lines proposed for the correction of what they regarded as an improper classification "lacks sufficient probative force" (A. 94). Those lines now argue (Br. 66): "Even assuming that the estimate made by the Southern railroads was inadequate, it was incumbent upon the Northern railroads to produce the data in their possession necessary to make an adjustment without resort to any estimate."

Southern lines petitioned for the data desired by them to make an adjustment in the figures classifying the cars in question as interchange traffic. Northern lines consented

to Southern lines having access to the data (A. 1037). Southern lines represented that this data "provides adequate detail for the adjustment reflected in the Southern lines' cost study . . ." (Southern lines' brief before the Commission, p. 109.)

G. The Commission Acted Lawfully in Rejecting Southern Lines' Addition of Pulpwood and Phosphate Rock Constant Costs to Their Cost of Handling North-South Traffic.

This section of Southern lines' brief deals with the Commission's rejection of an adjustment proposed by Southern lines for the addition of over \$7,800,000 to their costs to make up for the full share of constant costs which, they say, are not recovered on intra-south shipments of wet phosphate rock and pulpwood.

The movements are wholly intraterritorial within the South. Southern lines' theory in proposing this adjustment, however, was that the movement of pulpwood, for example, into paper mills is on rates that are made low so that the paper products which are made from the pulpwood will be induced to move outbound by rail, and paper products do move from the South to the North. They stated, for example, that the relationship between the inbound movement of pulpwood and the outbound movement of paper products was essentially a "transit" relationship and that, therefore, to the extent that the revenues for the transportation of the pulpwood inbound to the paper mill did not cover the total of out-of-pocket plus constant costs attributable to that local transportation, the deficit in constant costs should be charged to the North-South traffic and added to the Southern lines' costs in this case. The Northern lines argued, among other things, that there was no such transit relationship as the Southern lines had postu-

lated as an essential part of their argument.²⁰ They also pointed out that they were not parties to the rates involved, that they had no control whatever over their level or any other aspect thereof. The Commission's power as to divisions is to prescribe the division of *joint* rates (49 U.S.C. § 15(6)).

The Commission disagreed with Southern lines' essential theory and was unable to find that the pulpwood and wet phosphate rates within the South are so related to the interterritorial rates that there is a sound basis for the adjustment proposed by Southern lines (A. 128). Southern lines in no way attack that determination. Indeed, their brief does not even hint that it was made. They pretend that the Commission decided the point on the ground that there were comparable situations in the North and they argue that Northern lines failed to come forward with facts concerning similar situations in the North notwithstanding which the Commission "upheld the Northern railroads' position and used average costs." As indicated above, this does not accurately represent the Commission's disposition of this point.

IV. Southern Lines' Argument That the Commission Has Not Justified Its "Abandonment of Uniform Divisions Between Territories Having Uniform Rates" Is Without Merit.

Under their Point III the Southern lines urge that the Commission erred in not "justifying" its abandonment of uniform divisions between the North and the South "particularly since those territories have uniform rate levels" (Br. 68-9).

20. A description of a proper transit arrangement is contained in *Board of Trade v. United States*, 314 U.S. 534, 537-538 (1942).

In arguing the point the Southern lines say (p. 72):

"Nothing in Section 15(6) of the Interstate Commerce Act authorizes the Commission to regard divisions based upon relative costs as so obviously just, reasonable, and equitable, that their prescription follows as a matter of course and without the reasoned findings to explain such action as required by the Administrative Procedure Act."

These are the same parties who urged in their brief before the Commission in the present case that (p. 249):

"The Divisional Scale Must Reflect Cost Relationships in Order To Produce Fair Divisions on Official-Southern Traffic."

At pages 254-5 of that brief the Southern lines quoted this statement and stated that they endorsed it:

"The Commission's objective should be to ascertain the relative amounts of service rendered by each group of lines as reflected in their relative service costs and to let that standard govern the distribution of the revenues. Scales of pro-rating factors based upon relative costs automatically make appropriate provision, on an average basis, for both the terminal and line-haul services rendered."

The Southern lines carried that contention into a formal proposal for the prescription by the Commission of specific scales based upon Southern lines' contentions of what the relative costs were. At page 271 of their brief before the Commission, they stated:

"The divisional scales proposed by the Southern lines are constructed directly from the costs developed in their cost study. The proposed scales are incorporated in the proposed findings attached to this Brief."

These scales are found in the Appendix (p. A-3) to said brief (A. 1071). Reference thereto will show that, in recognition of their claimed higher costs, Southern lines proposed scales higher for themselves than for Northern lines. They had no concern for "uniformity in divisions based upon uniformity in rates."

Having urged the Commission to predicate the prescribed divisions on the basis of relative costs, it is manifest that the Southern lines cannot now be heard to say that the Commission committed an error of law in so doing. They purport to rely upon § 8(b) of the Administrative Procedure Act. The pertinent provision thereof is that all decisions shall include a statement of findings and conclusions as well as the reasons or basis therefor "upon all material issues of fact, law, or discretion presented on the record." There was no issue when the party now complaining about the matter urged the Commission to do the very thing about which complaint is being made.²¹

Wholly independent of the fact that the Commission did what Southern lines urged it to do in prescribing divisions on the basis of relative costs, it should be noted that the factual basis upon which Southern lines predicate their argument is unsound. Contrary to the statement on page 70 of Southern lines' brief to the effect that the Commission's decision in *Divisions of Rates, Official & Southern Territories*, 234 I.C.C. 175 (1939), "prescribed an inflation in the divisions of the Southern Railroads on the express ground that the rates in the South were higher on such traffic than

21. On p. 73 of their brief Southern lines argue that the prescribed divisions also divide profits realized on the traffic and that the division of profits would seem to turn more upon consideration of revenue needs than costs. Divisions divide rates, regardless of the amount of revenue produced thereby. And this argument is in conflict with Southern lines having insisted before the Commission that the rates should be divided on the basis of relative fully-distributed costs.

the rates in the North" and allowed Southern lines a higher division only where interterritorial rates were higher than those within Official Territory, it may be noted that in that case (1) the Commission prescribed divisions on vegetables from Florida over 50% higher for Southern lines than for Northern, yet there is not the slightest indication in the report that the rates from the South to the North were 50% higher than vegetable rates within the North or even that there were any significant vegetable rates within the North; (2) the Commission prescribed as to all existing rates, on general traffic, divisional factors 25% higher for Southern than for Northern lines except on only three categories of traffic, denatured alcohol, cast iron pipe, and export and import rates between Central Territory and certain Southern ports. Notwithstanding the fact that there were countless rates between the North and the South that were on the same level as those within the North, the Commission excepted only these—among all the then present rates—from its order that the Southern lines should have 25% higher divisions.

At page 192 of its report in that case the Commission said that it considered the 25% difference in the prescribed divisional factors "fair in the light of all the facts before us." Among those facts were the evidence as to service costs, the discussion of which started at page 186 and ran over to page 190, with a conclusion, on page 189 that:

"... transportation costs on the traffic here considered may properly be considered to be higher in the South, and that, although the exact degree of difference is indeterminable, it is not negligible, as the northern lines argue."

Then, in the next case (the first decision in the instant docket) the Commission said, concerning the earlier case (287 I.C.C. at p. 524):

"The element of cost was given weight in our 1939 report upon a showing that from 1932 to 1936 the cost per revenue ton-mile in the South was about 16 percent higher than that in the North."

Moreover, with respect to the Commission's having prescribed divisional factors on citrus fruit which were 85% higher for Southern than for Northern lines, this Court said the factor of financial need appeared to have been given much weight. (*Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 361.)

Southern lines are incorrect in their statements or implications that equal divisions between Official Territory and the South and between Official Territory and the Southwest were prescribed in the 1953 decisions because equal (class) rates were prescribed. The Commission made it clear in those reports that it was not the equal class rates, as such, but the facts behind the prescription of equal class rates—the findings as to equality of costs at that time—that induced the prescription of equal divisions; *Official Southern Divisions*, 287 I.C.C. 497, 523, 526; *Official-Southwestern Divisions*, 287 I.C.C. 553, 578.

The major premise of Southern lines' proposition that the present order of the Commission, in reflecting cost relationships, constitutes a departure from a long-standing standard of fixing North-South divisions in relation to rate levels is, therefore, shown to be unfounded in fact. That the Commission has not adopted any such policy or standard, either as to North-South divisions or generally, is shown also by its report in *Atlantic Coast Line R. Co. v. Arcade & A.R. Corp.*, 198 I.C.C. 375, at 378-379:

"At several places in defendants' petition we are charged with serious error in not following and respecting principles said to have been laid down in

our decisions or those of the Supreme Court dealing with divisions. It may well be doubted whether decisions in prior cases may properly be said to be a *source of principles governing divisions, which are rather to be sought in the statute empowering us to fix divisions.* Examination of our prior decisions will show that we have at all times asserted it to be our duty to consider each divisional controversy coming before us strictly on its own merits without regard to any fixed basis or general standard of divisions . . ." (Emphasis added.)

In essence, the Southern lines are arguing that equal class rates require equal divisions. As previously shown, class rates are of extremely minor importance from the standpoint of the amount of traffic moved thereon. The general body of rates is higher in the North than in the South.²²

Even more important is the fact that the class rates were prescribed on the basis of territorial cost relations as of 1939 (27 years ago) in *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945). There has been a tremendous change since that time. It would be arbitrary in the extreme to take those class rates and then reason that because class rates are equal, divisions must be equal. To do this would involve ignoring the evidence of record with respect to current facts in favor of facts existing twenty-seven years ago as reflected in the little-used class rates.

In addition to the invalidity of Southern lines' contention on the grounds discussed above, it is invalid as a matter of law. Mere inconsistency with a prior decision is not a valid basis for setting aside a later decision of an administrative agency. *William N. Feinstein & Co. Inc. v.*

22. See *supra*, p. 14.

United States, 317 F. 2d 509, 512 (1963); *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 482 (1918); *Virginia Ry. v. United States*, 272 U.S. 658, 665 (1926); *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 359 (1936).

In *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954) the Court required the Commission to explain "its departure from prior norms" (347 U.S. 653). The prior norm in that case was virtually a rule of law. Here, however, the Commission is asked by Southern lines to explain why it departed from a past decision establishing a uniform scale on a purely factual basis, in favor of a scale based on relative costs. This is a matter for the Commission's administrative determination on the record before it. Its departure from the prior scale is not a departure from a prevailing rule. *Atlantic Coast Line R. Co. v. Arcade & A. R. Corp.*, 194 I.C.C. 729.

The final argument advanced by Southern lines is that if the Commission correctly found that the Northern lines had relatively higher costs, then *ipso facto* the Northern lines must be deemed relatively inefficient as compared with the Southern lines and the Commission's finding that the two sets of carriers were equally efficient is contradictory and inconsistent. Obviously, higher costs may be incurred for any number of reasons having nothing to do with relative efficiency, e.g., higher wages, higher taxes, number and size of cities served with their influence on terminal operations, etc. Southern lines made no claim of inefficiency, as such, before the Commission. The only matters they raised with even remote relevance thereto were decided against them (A: 38). And, of course, they claimed that their costs were higher than those of Northern lines without any suggestion that they—Southern lines—were inefficient.

V. Reply to the Contention That the District Court Was Correct in Not Reserving Jurisdiction.

At p. 55 of Northern lines' principal brief in this Court it was pointed out that in view of the large sum of money involved those lines would have to proceed with great caution, that they believed that the Commission's order would be sustained but suggested that in the unlikely event that there should be a remand, the prescribed divisions should be permitted to continue in effect subject to possible readjustment following the remand proceedings.

Beginning at p. 76 of their brief, the Southern lines argue that Northern lines agreed to conditions requiring them to resettle all revenues accruing during this litigation in accordance with the preexisting basis of divisions "in the event the Commission's orders were set aside."

The order of the District Court containing the conditions to which Northern lines agreed provides that in the event the Southern lines are successful in "permanently setting aside" the Commission's order Northern lines will resettle their accounts on shipments made on and after April 20, 1965, with interest at 5% on the difference between revenues based on the divisions prescribed and revenues based upon the old divisions (A. 169-171).

If the Commission's order should be found deficient in such a way that the deficiency would not go to the merits of the whole order it would be unjust to set it aside permanently, or to set it aside at all. It might be found deficient, for example, with respect to the Commission's rejection of only one cost adjustment that was advocated by Southern lines and refused by the Commission. In such circumstances it would be unjust to deprive Northern lines of the entire relief to which the Commission found them entitled. It would, therefore, be unjust to enter an order permanently setting aside the Commission's order.

As noted at p. 57 of our opening brief, in *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954), the case under review was remanded to the Commission for further proceedings, but without invalidating the Commission's order or enjoining its enforcement, thus leaving the unloading charges fixed by the Commission's order in effect pending completion of the remand proceedings. A similar procedure here, in the event of remand, would protect the interest of all parties by assuring the application of such divisions as the Commission might ultimately prescribe to all traffic moving subsequent to April 20, 1965, the effective date of the divisions now being applied.

On p. 57 of their initial brief Northern lines suggested an alternative to the procedure just mentioned, namely, a direction to the District Court to retain jurisdiction to make an equitable resettlement of the divisions in the event that upon remand the Commission in a valid order prescribed new divisions for the Northern lines more favorable than the old divisions.²³

VI. Reply to the Brief of the Southern Governors' Conference et al.

The brief of the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners, hereinafter called the "Conferences",

23. In their argument on this general point Southern lines contend that the preexisting scale was found to be defective to their prejudice and appear to urge that the settlement of revenues on the basis of the preexisting divisions would, nevertheless, give Northern lines the benefit of that preexisting scale. The Commission's conclusion to revise the scheme of the scales was made, however, only in the light of its conclusion to be guided by the relative costs in its general determination (A. 63) and, as the District Court pointed out:

"It cannot be known what the Commission would have done with respect to giving weight to that argument if it were viewed independent of the other facts which induced the Commission to prescribe the divisional bases which it did prescribe."

makes many assertions as to facts but the brief is characterized by an unusual paucity of references to evidence in support of such assertions.

The brief also contains repeated assertions to the effect that although *New York v. United States* had made it clear that there were no inherent differences in transportation conditions in the North and the South, Northern railroads refused to accept equality with the South (p. 4), that in seeking cost related divisions Northern lines did so pursuant to "their aim of obtaining a preference for the North" (p. 4), as a part of the "overall strategy pursued by all of the Northern interests" (p. 4, n.) to obtain preferential treatment in rail transportation charges and, quoting from a speech of Mr. Thurman Arnold, made 27 years ago, that the East had been exploiting the South and treating it as a colony (p. 42). The Northern railroads accepted the Commission's decision granting equality of class rates in *Class Rate Investigation, supra*, and did not join in the appeals (decided in *New York v. United States*) from that decision. Cost relationships have changed since that time and fully justify those railroads seeking higher divisions.

Extravagant claims to the effect that this case is of vital importance to the South and will erect territorial trade barriers (Conference Br. p. 13) and that this case represents an effort to obtain a preference for the North have no foundation whatever. Indeed, recognition of the higher costs of Northern railroads, to the extent that such would be pertinent at all in the fixing of rates, could only mean that the rates within the North would be higher than within the South and between the two territories. The situation would be just the reverse of that which existed as to class rates prior to the decision in *Class Rate Investigation, supra*. Moreover rates and divisions are governed by different statutory criteria and the rates are subject to many

competitive factors which influence their level and relationships. Shippers, including those in the South, pay rates, not divisions.

A. There Is No Sound Basis for Requiring the Commission, as a Prerequisite to Prescribing Cost-Related Divisions, to Find That the Costs Reflect Inherent Territorial Advantages and Disadvantages.

Section 15(6), which empowers the Commission to prescribe divisions and requires that it give "due consideration" to specified elements, puts upon the Commission no such restriction concerning its use of relative costs as Intervenors ask this Court to impose.

No judicial construction of Section 15(6) supports Intervenors' theory.²⁴ On the contrary, the cases clearly establish that it is the exclusive province of the Commission to make findings of fact, to draw inferences therefrom and to evaluate and determine the weight to be given the evidence of record. See *New York v. United States, supra*, at pp. 49-50; *Chic. St. P. M. & O. R. Co. v. United States*, 322 U.S. 1, 2, 3 (1944); *Alton R. Co. v. United States*, 315 U.S. 15, 23 (1942).

24. While the Conferences do not attempt to define what they would include within the scope of "natural" or "inherent" territorial disadvantages, it may be noted that they would exclude therefrom such matters as differences in wage rates (p. 27) (this and all other references in this footnote are to the pages of the Conferences' opening brief in the District Court), differences in tax rates (p. 27), differences in car utilization (p. 27), higher empty return ratios (p. 25), higher switching costs (p. 25), higher interchange costs (p. 25), economic conditions (p. 22), differences "which can be and will be eliminated by the normal working of economic forces", without limitation as to time. Thus, under "inherent territorial advantages and disadvantages" the Intervenors would apparently exclude virtually everything that might affect relative costs except physical or "natural" conditions such as topography, grades and curves, and climatic conditions.

The Conferences rely upon *New York v. United States* as supporting their contention that, as a prerequisite to the prescription of divisions on the basis of relative costs, the Commission was obliged to find that the costs of Northern lines reflected inherent territorial disadvantages (A. 51). *New York v. United States* imposes no such requirement. In that case the Commission found that conditions as between the respective territories did not justify the then existing differences in the class rate structures (331 U.S. at 315). The Court pointed out (at pp. 315-16) that:

“In reaching that conclusion it first inquired whether the differences in the costs of furnishing the railroad service in the several rate territories justified the existing differences in the levels and patterns of the class rate scales.”

Thus the Commission looked to the costs as the primary evidence of relative transportation conditions affecting the rates involved; it did just the opposite of what the Interveners now claim, namely, that it imposed a requirement that costs could not be used without in some way validating them by reference to territorial conditions.

In the present case the Commission stated (A. 51):

“Relying on *New York v. United States*, 331 U.S. 284, 315 (1947), the interveners also take the position that natural disadvantages must be found in the North before we may increase the divisions of the northern railroads. In essence, however, other factors being equal, cost differences generally are the product of, and reflect, the inherent advantages and disadvantages that go to make up the respective overall transportation conditions in the two territories. Cf. *Louisville & N.R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, at pages 646-47.”

Obviously the most important of the other "factors" that could affect this matter would be the factor of efficiency. At A. 39 the Commission found that:

"... the northern lines' cost of service is not shown to be affected by purported waste or inefficiency. More affirmatively, we find that both groups are being operated efficiently and that neither group should be considered as more or less efficient than the other."

The Commission found, in addition, that the other factors required to be considered by the statute, as well as the other facts, were substantially equal (A. 79 and A. 80).

These findings of the Commission disposed of the Interveners' argument and completely satisfied the requirements of the Administrative Procedure Act.²⁵

Very much like the Commission's statement in the present case to the effect that cost differences generally reflect the inherent advantages and disadvantages that go to make up overall transportation conditions is the following from this Court's opinion in *New York v. United States, supra*, at 348-49:

25. It will be noted that the Commission made reference to *Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, at A. 51. There the Commission, consistent with its conclusion here, said, after describing contentions concerning operating conditions:

"While an appraisal of the evidence regarding physical operations indicates that both the complainant and the defendant operate in mountainous terrain, there is no need to determine whether such transportation conditions are more favorable or onerous to one than to the other. The nature of the physical transportation circumstances is concededly reflected in the cost of operations. In this respect, the cost data hereinafter discussed form a sounder basis for a determination of the issue raised than any conclusions to be drawn from the numerous factual statements regarding operating conditions."

This decision was upheld in *Carolina & Northwestern Ry. Co. v. United States*, 234 F. Supp. 112; affirmed, 380 U.S. 526.

"Revenue needs, *like costs of rendering the transportation service*, are germane to the question whether differences in territorial rate structures are justified by territorial conditions. They are amongst the standards written into § 15a; *they reflect the totality of conditions under which the carriers in the respective territories operate.*" (Emphasis added.)

In addition to the fact that there is no such legal requirement as the Conferences contend, the factual basis of their argument is completely unsupported. It cannot be stressed too greatly that there is nothing in the record to substantiate the sweeping claim of the Conferences, repeated over and over again, that the higher costs of the Northern lines are the result of over-capacity and consequent waste. There is simply no evidence comparing the Northern and the Southern lines from any standpoint of overcapacity. Moreover, the record in the instant case contains ample evidence of differences in Northern and Southern territorial conditions which are not related to overcapacity but which reflect themselves in cost consequences. Thus, by way of examples, Eastern lines operate in a more populous territory where they have shorter hauls and a greater proportion of terminal to line-haul service (V.S. 5, 6 & 7; A. 493-496, 504, 518-520, 523-525, 532); as shown in V.S. 69, at pages 5 to 8 (A. 890-892), railroad terminal expenses tend to rise much faster than line-haul costs; wage rates and taxes are higher in the North than in the South (A. 938-940). As demonstrated in V.S. 80, Section F, if the Northern lines in 1956 had the benefit of Southern lines' wage and tax bases they would have realized savings of \$168,598,737 (A. 939-940).

The presence or absence of over-capacity as affecting relative territorial costs can be indicated by making com-

parisons of fully distributed costs and out-of-pocket costs, which latter eliminates fixed costs (50% of the return on road property as well as 20% of all expenses, taxes and rents).²⁶ When comparison is made of Eastern District and Southern territorial costs on an out-of-pocket basis the Northern proportion of total costs is *larger* than when using fully distributed costs (V.S. 3, Ex. B, p. 14; A. 454).

In fact, the claim of Northern lines' over-capacity is founded upon Interveners' generalizations concerning merger activity in the North. However, the Commission found "the southern lines themselves have noted that mergers are now going forward in all territories, including the South" (A. 39). It is a matter of common knowledge that all major Southern railroads have been parties to merger negotiations. This includes such important lines as the Illinois Central and Gulf, Mobile & Ohio, and the already approved mergers of the Central of Georgia and Southern Railway and of the Seaboard Air Line and the Atlantic Coast Line, the latter carrier, of course, already being in control of the Louisville & Nashville.

The Commission found that if and when the proposed mergers are ultimately approved and finally consummated "in both groups the savings produced thereby will be then reflected in the respective unit costs." It then stated: "The economies hoped to be effected thereby and the savings expected are not ascertainable for future operation to the degree required for any specific adjustment here of the cost studies of record. We find upon this record that the northern lines' cost of service is not shown to be affected by purported waste or inefficiency" (A. 39).

Nothing could be more a matter for determination by the administrative body than that dealt with in the conclu-

26. See *American Lines v. L. & N.R. Co.*, 392 U.S. —, (1968) fn. 4, p. —, 88 S. Ct. 2105, 2108.

sions that expected savings are not ascertainable for future operation to the degree required to adjust cost studies of record. These findings together with the findings under "Importance to the Public" at A. 50 and A. 51 are all the findings that the Commission was required to make in disposing of the Conferences' point.

B. The Conferences Contention That the "Principle" of Local Responsibility Requires Equal Divisions Notwithstanding the Higher Costs of One Group of Railroads Is Unsound.

Under this point the Conferences argue (Br. 32 et seq.) that they contended before the Commission that whether or not the Northern lines' higher costs were the product of inherent disadvantages, "the imposition of any part of that cost burden on the South" would be improper unless "the North were found to be unable to support its own cost burden." The conferences urge that the effect of the Commission's decision will be to increase the rates of Southern shippers or diminish their service (Br. 37-38). They contend that the Commission failed to rule on this point and that such failure constitutes a violation of the Administrative Procedure Act.

This argument of the Conferences means that a shipper who happens to live in Boston, and who ships to Detroit, for example, would be required to pay not only the cost allocable to his own shipments but enough, in addition, to make up the amount by which a rate paid by a shipper from Atlanta to Detroit, for example, is reduced below the cost allocable thereto in recognition of the higher costs of the Northern line which participates in the shipment. The man in Boston is a user of the Northern railroads and so is the man in Atlanta (whose shipment moves, for example, by the L.&N. to Cincinnati, thence the B.&O. to Detroit).

Neither customer of the railroad is any more responsible for those railroads than the other. Each is simply a patron thereof.

The Conferences indicate that "the principle" that each territory is primarily responsible for carrying its own "cost burden" is established in *New England Divisions*, 126 I.C.C. 579, 599 (1927) and, on p. 33 of their brief, they quote therefrom about the dangers in the assumption that deficiencies in local earnings must inevitably be made up on interchange business. But this had nothing to do with relieving shippers or carriers of another territory from paying rates, or having divisions, related to the cost of a railroad whose services the shipper uses. In that decision, Commissioner Eastman first quoted from *United States v. Abilene & Southern R. Co.*, 265 U.S. 274, at pp. 284-85, wherein it was stated that it is settled that in determining divisions the Commission may, in the public interest, take into consideration the financial needs of a weaker road and that it may be given a division larger than justice merely as between the parties would suggest in order to maintain it in effective operation.

Then the decision continued (126 I.C.C. at 599):

"If the operating costs of the New England roads per ton-mile are twice those of their connections, their revenues per ton-mile must of course be approximately twice as much also, in order merely to produce an approximate parity in operations, without even considering investments. If on the one-third of their tonnage which is local to New England they are unable to receive revenues which are twice those of the Trunk Lines on local business, then their divisions must be enough more than twice those of the Trunk Lines per ton-mile to make up the difference."

It is clear, therefore, that in *New England Divisions* the Commission simply declined to push its "financial need" power to the extent desired by the complainants. It was in no way indicated that where divisions are prescribed without reliance on the financial need doctrine but merely to achieve justice as between the parties the Commission might not make divisions on a cost-related basis but, instead, must require the shippers of the territory wherein the railroad operates to bear not only the costs attributable to their own shipments but a part of the cost attributable to the traffic of those who ship from the territory wherein railroad costs are lower.

The Commission here rejected any reliance upon the financial need doctrine (A. 78-79). It was completely within its discretion to employ a relative cost basis as a common standard of measurement reflecting "what justice merely as between the parties would suggest . . .".²⁷

Indeed, as was pointed out above, the Southern lines urged in the present case that the Commission should prescribe the divisions on exactly that basis.²⁸

None of the Commission cases cited by the Conferences at pages 33-35 of their brief support their suggested "prin-

27. The quoted phrase is from *U. S. v. Abilene & So. Ry. Co.*, *supra*, at p. 285; and is also used in *B. & O. R. Co. v. United States*, 298 U.S. 349, 370.

28. The primacy of relative costs as the initial indicator of justice as between the parties is indicated by numerous expressions of the Commission. For example, in *Akron, C. & Y.R. Co. v. Atchison, T. & S.F. Ry. Co.*, 322 I.C.C. 491, at 506, the Commission concluded:

"In the prescription of just and equitable divisions the matter of rate level is not controlling since our objective is to prescribe fair proportions of revenue whether the rates be on a high or a low level. In fixing such proportions it is the relative contribution of the parties, in terms of costs, that furnishes the initial indication of what is just and equitable among the carriers."

This Court held that the Commission's orders in that case were valid. *Chicago & N.W.R. Co. v. A.T. & S.F. R. Co.*, 387 U.S. 326. See also *New England Divisions*, 66 I.C.C. 196, 198 and 199 (1922).

ciple of primary local responsibility through equality of divisions . . . " which they assert "has been consistently followed by the Commission for more than thirty years."

Thus, in *Official-Southwestern Divisions*, 287 I.C.C. 553, 579 (1953), while recognizing that acceptance of relative transportation costs in 1948 at face value "would necessarily support the contention of the eastern lines that the divisional factors to be prescribed should be weighed 10 percent in their favor," the Commission concluded:

"Upon all the evidence bearing on operating costs we believe it would be unsafe to conclude that in the future there will be any appreciable difference in the average cost levels of the southwestern and eastern lines."

For similar reasons the 1953 decision in *Official-Southern Divisions*, 287 I.C.C. 497-526, does not support the Conferences' alleged "principle". In none of the other cases cited in which the Commission prescribed equal-factor divisions did it recognize the existence of higher costs in the East, but refuse to give effect thereto because of the "principle" for which the Conferences contend. *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175 (1939), is not such a case, since the Commission there regarded the costs within the South as then being higher than in the North (234 I.C.C. 175, 189).

With respect to the Conferences' point about the necessity for findings, it should be noted that although the Commission is not required to make subordinate findings on every collateral contention advanced, *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193 (1959), their finding that the continued maintenance of divisions which, all other things being equal, do not reflect the relative costs of service would not suggest justice as between

the parties (A. 51), is clearly sufficient with respect to the present contention of the Conferences.

The last five pages of discussion under this point (Point III) of the Conferences' brief discusses alleged economic facts which are in no way pertinent to the point urged by them. It, therefore, needs no reply although much of what is said is in conflict with the Commission's conclusions under the heading "Economic Trends" in its report in this case (A. 31-33). One interesting statement in the report (A. 32) is the following:

"A southern respondent in 1960 represented 'that the South's economic development since World War II has outpaced the national rate of growth in practically every category you can name.'"

With reference to the Conferences' statement concerning the inadequacy of the rate of return of Southern railroads (Br. 38), it may be noted that in the recent case cited by them, *Increased Freight Rates, 1967*, 329 I.C.C. 854 (1967), the Commission found that rates of return on net investment for the Eastern and Southern railroads were as follows:

Year	Percent on net investment	Eastern district	Southern district
1950	3.63	5.31	
1951	3.47	4.74	
1952	3.86	5.27	
1964	2.56	4.01	
1965	3.32	4.16	
1966	3.54	4.45	
12 months to March 31, 1967	3.15	4.44	

The suggestion that the Commission's decision in the present case would result either in a substantial diminution in the quality of rail service within the South or a "substantial increase in rates", and all the speculative consequences thereof which are alleged by the Conferences, are hollow in the extreme. The Commission's estimate of the amount of the revenue reduction to the Southern lines as a result of the order here under review (\$7,948,000, A. 80) is only 62/100 of 1% of the freight revenue of the Southern lines (\$1,280,900,000, A. 776) for the year in which the Commission's calculations were made (1956). After an appropriate adjustment for income taxes therefor, it would appear that the reduced revenue might be somewhere in the neighborhood of 4/10 of 1% of the gross freight revenue of Southern lines. It is difficult to understand, therefore, how Southern lines could be envisaging "a substantial increase in rates" as a consequence of this divisions order. The Commission considered the Southern lines' contentions and found that the prescribed divisions "can result in no unlawful injury to the South" (A. 51).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded to that court with instructions to dismiss the complaints.

Respectfully submitted,

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APPENDIX

This is a reproduction of a footnote on page 119 of Southern Lines' Exceptions to the Examiners' Recommended Report, showing Southern Lines' calculation of the amount of their solely related passenger deficit for 1956 to be allocated to Official-Southern (North-South) traffic.

The figures under the year 1957 were added by Northern Lines. The record references given in Plaintiffs' table apply also to the figures added by Northern Lines.

• The portion of the so-called "solely related" passenger deficit for the year 1956 included in the costs assigned to Official-Southern traffic, and excluded in the Southern lines' restatement of costs in these Exceptions, is computed from the record as follows:

1. Solely Related Passenger Deficit, Southern Region, Year 1956 (Exhibit R-13)	\$11,302,132	19, 959, 810
2. Portion of Solely Related Passenger Deficit related to distance (.70† times line 1)	\$ 7,911,492	13, 971, 867
3. Portion of Solely Related Passenger Deficit unrelated to distance (.30† times line 1)	\$ 3,390,640	5, 987, 943
4. Ton-miles, Southern Region, Year 1956 (V.S. 3, Ex. A, p. 15)	93,914,726,000	\$9,166,854,000
5. Tons originated plus terminated, Southern Region, Year 1956 (V.S. 3, Ex. A, p. 22)	509,992,564	480, 343, 361
6. Solely related passenger deficit per ton-mile (line 2 ÷ line 4)	.00842†	.01438 ‡
7. Solely related passenger deficit per ton (line 3 ÷ line 5)	.66484†	.17412 ‡
8. Ton-miles of Official-Southern traffic south of break points (V.S. 40A, Ex. K)	15,625,356,000	
9. Tons of Official-Southern traffic originated or terminated in South (V.S. 40A, Ex. K)	28,055,721	
10. Portion of solely related passenger deficit related to dis- tance allocated to Official-Southern traffic (line 6 x line 8)	\$1,315,655	2, 448, 493
11. Portion of solely related passenger deficit unrelated to distance allocated to Official-Southern traffic (line 7 x line 9)	\$ 186,526	348, 743
12. Total portion of solely related passenger deficit allocated to Official-Southern traffic (line 10 + line 11)	\$1,502,181	2, 798, 436

† 70-30 is the approximate allocation of passenger deficits as between distance and unrelated to distance under Rail Form A. Changing this factor, would have no appreciable effect on the result of this calculation since such a change would not change the total amount of the solely related passenger deficit allocated to Official-Southern traffic, but would have only a minor effect on the relationship between terminal and line-haul costs.